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No. 97-2020

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1997

THE METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

v.

NEW YORK MAGAZINE, A DIVISION OF PRIMEDIA MAGAZINES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

# BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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## TABLE OF CONTENTS


Page

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

INTEREST OF THE AMICUS CURIAE . . . . . 1

ARGUMENT . . . . . 6

CONCLUSION . . . . . 7

## TABLE OF AUTHORITIES

**Cases** **Page**

*Arkansas Educational Television Commission* v. *Forbes*,
118 S. Ct. 1633 (1998) . . . . . 5

*International Society for Krishna Consciousness* v. *Lee*,
505 U.S. 672 (1992) . . . . . 2

*Lehman* v. *City of Shaker Heights*,
418 U.S. 298 (1974) . . . . . 5

*New York Magazine* v. *Metropolitan Transportation Authority*,
136 F.3d 123 (2d Cir. 1988) . . . . . 5

*New York Magazine* v. *Metropolitan Transportation Authority*,
987 F. Supp. 254 (S.D.N.Y. 1997) . . . . . 7

*Southeastern Promotions, Ltd.* v. *Conrad*,
420 U.S. 546 (1975) . . . . . 2

**Other Authorities**

"A Vivid-Livid Divide," *New York Times Business Day*,
at D-1, July 19, 1998 . . . . . 2

Pursuant to New Rule 37.6, none of the parties authored this brief in whole or in part and no one other than the Agudath Israel of America, its members, or counsel contributed money or services to the preparation or submission of this brief.

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## INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America respectfully submits this *amicus curiae* brief, with the consent of the parties, for one essential purpose: to bring to the Court's attention the larger communal interest in this case.

The specific dispute that precipitated this proceeding, over a satirical advertisement that referred to the mayor of

New York City by name without obtaining his prior consent, may at first blush appear to be of narrow concern and perhaps less than *cert*-worthy, but the larger ramifications of the Second Circuit panel's 2-1 ruling below are substantial and merit the Court's careful consideration. The majority ruled that advertising space leased by the Metropolitan Transportation Authority is a "designated public forum," so as to require the MTA to demonstrate that content-based restrictions on advertising are "narrowly drawn to achieve a compelling state interest," *International Society for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 678 (1992); and that any decision by the MTA to reject a commercial ad is a "prior restraint," so as to impose on the MTA "the burden of instituting judicial proceedings, and of proving that the material is unprotected," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975). The decision was rendered in the context of a satirical ad that few would find offensive, but its real significance is that it severely curtails the ability of urban transit agencies like the MTA to reject even the most highly objectionable advertisements.

Over the past several years, Agudath Israel -- a 76-year-old *New York*-based national Orthodox Jewish organization -- has noted with deep concern the growing proliferation of offensive and indecent ads, which assault impressionable young persons with images and messages that are harmful to their healthy moral development. The "trend to be rude, crude and sometimes lewd" in commercial advertising was recently reported on the first page of *The New York Times* business section ("A Vivid-Livid Divide," *New York Times Business Day*, at D-1, July 19, 1998):

> "Sales pitches for a wide variety of products are being ... infused with increasingly explicit images and language, which until recently had been considered too daring for conventional advertising.

". . . .

"Backsides are being bared in advertising for underwear, liquor, skin lotion and fitness equipment and are invoked in colloquial expressions about 'kicking butt' and other synonyms for rear end. Other body parts, particularly those that differentiate men and women, are being uncovered in photographs or referred to in slang terminology.

"Bodily functions from passing gas and urination to vomiting and defecation are depicted and alluded to in advertising for shoes, automobiles, software, games - even food.

"Earthy catch phrases or sayings with double meanings are repeated constantly. 'Are you getting enough?' an ad for cottage cheese coyly asks, referring to calcium. 'Zit happens' is a line in an ad for acne medication, 'Fit happens' in an ad for boots and 'Grease happens' in an ad for spray cleaner. And it has become impossible to count all the variations on such lines as 'Size matters' and '... or are you just glad to see me?'

"Then there is the more daring sexual imagery, extending far beyond traditional realms like fashion and fragrance advertising into such categories as shampoo, beer, video games, cars and resorts. Some ads flaunt signs of arousal, others are festooned with phallic symbols while still others present simulations of sexual intercourse."

Many parents in Agudath Israel's constituency -- and, surely, other groups as well -- do their best to shield their children from such images in their own homes. But parents are powerless to protect their children when they step out in the street. For urban dwellers, especially, who live in areas that rely heavily on mass transit including buses that traverse city thoroughfares, it is becoming increasingly difficult to venture out into the street without being bombarded with commercial ads that utilize lewd and risque images to hawk their wares. Agudath Israel and other like-minded groups have identified this problem as an important quality of life issue, and have brought it to the attention of various policy-making bodies.

In New York City, the MTA responded to these concerns, in part, by adopting advertising standards in March 1994, and then again more recently in September 1997. Pursuant to the 1994 standards, the MTA will not accept ads that contain "obscene" material, material that is "indecent to minors," or "offensive sexual material" as those terms are defined in the New York State Penal Law. The 1997 standards expand upon the list of prohibited ads, so that the MTA will now reject any ad that "contains an image of a person, who appears to be a minor, in sexually suggestive dress, pose or context," "promotes an escort service, dating service, or sexually oriented business," or "contains images or information that would be deemed by a significant segment of the public to be patently offensive, improper, or in bad taste." Also unacceptable under the 1997 standards are ads that "demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation," or that "are so violent, frightening, or otherwise disturbing as to be harmful to minors."

The Second Circuit's decision below, if allowed to stand, could well effectively nullify these standards. Faced with the expense of having to commence a legal proceeding

every time it wishes to reject an ad under the standards, and the uncertainty of prevailing in its burden of proof that its interest in implementing the standards rises to the level of "compelling," the MTA may well decide entirely to avoid the problem by simply allowing the ad to appear as is. Private citizens would have no legal recourse; there is no theory of law of which we are aware that would enable a member of the public to compel the withdrawal of even the most grossly offensive ad.

It is true that the MTA could take a step, even under the Second Circuit's analysis, that would allow it to retain and effectively enforce its advertising standards: The agency could decide to accept only commercial speech ads and disallow all political speech ads, thereby bringing its policy in line with the policy determined not to create a public forum in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). *See New York Magazine* v. *Metropolitan Transportation Authority*, 136 F.3d 123, 129-30 (2d Cir. 1998). Indeed, if the decision below is allowed to stand, Agudath Israel and other concerned groups will surely press the MTA to take precisely that step. However, as the MTA correctly points out in its petition (at 14-15), the net result of such a drastic step would be "less speech, not more" (quoting *Arkansas Educational Television Commission* v. *Forbes*, 118 S. Ct. 1633, 1643 (1998)) -- hardly cause for First Amendment celebration.

Recognizing the potentially substantial public interest in this case, Agudath Israel submitted an *amicus curiae* brief to the Second Circuit when the district court's decision was appealed. The Second Circuit's expansive ruling, requiring pre-emptive litigation in order to justify what the panel's majority saw as a "prior restraint," has further upped the ante. Stated simply, the communal stake in this case is great.

## ARGUMENT

The petitioner's brief amply demonstrates that the panel decision below departs from this Court's established precedent and is in tension with decisions of other lower courts -- both with respect to the question of whether the MTA has allowed its property to become an unlimited designated public forum, and whether refusal of commercial advertising is a prior restraint that would require the MTA to institute a pre-emptive judicial proceeding.

If the Court grants the petition, *amicus curiae* Agudath Israel will offer its own independent analysis of the relevant case law. For now, though, mindful of the burden *amicus curiae* briefs impose on the Court, particularly at the petition stage of a proceeding, Agudath Israel simply adopts petitioner's argument as its own.

## CONCLUSION

"Who would have dreamed that the Mayor would object to more publicity? But that is what this case is all about." So stated the district court judge who issued the initial ruling in this case. *New York Magazine* v. *Metropolitan Transportation Authority*, 987 F. Supp. 254, 256 (S.D.N.Y. 1997). In truth, though, "what this case is all about" -- or, at least, what is has become all about in light of the Second Circuit panel ruling -- is something far more weighty: the ability of agencies like the MTA, in an era of proliferating commercial tastelessness and vulgarity, to adopt advertising standards that protect the public, including impressionable children, against images and messages that are offensive, objectionable and harmful. The issue is important, and worthy of Supreme Court review.

For the reasons set forth in the MTA's petition, and as elaborated herein, *amicus curiae* Agudath Israel of America respectfully urges this Court to grant the petition and accept certiorari.

Respectfully submitted,

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